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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DIXIE FINANCE COMPANY, INC., and
TRANSOUTH FINANCIAL CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 1983

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QUESTION PRESENTED

Whether, when a consumer finance company solicits its loan customers to buy credit life or health and accident insurance, it is engaged in the "business of insurance" within the meaning of Section 2(b) of the McCarran-Ferguson Act and Section 6 of the Federal Trade Commission Act so as to deprive the Federal Trade Commission of authority to investigate and proceed against the company's methods of selling insurance policies.

LIST OF PARTIES

The names of all parties are included in the caption to this Petition.[1]

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[1] Dixie Finance Company, Inc., is a wholly-owned subsidiary of Gulf Finance Corporation of Atlanta, Georgia, which is a wholly-owned subsidiary of First Atlanta Corporation of Atlanta, Georgia; and TranSouth Financial Corporation of Florence, South Carolina, is a wholly-owned subsidiary of NCNB Corporation of Charlotte, North Carolina.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Dixie Finance Company, Inc., and TranSouth Financial Corporation, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court is not yet officially reported and is set out as Appendix A to this Petition at pages 1a-8a, *infra*. The opinion of the court of appeals (Judge Reavley dissenting) also is not yet officially reported and is set out as Appendix B at pages 9a-21a, *infra*. An opinion of the Federal Trade Commission is set out as Appendix D at pages 25a-37a, *infra*.

JURISDICTION

The judgment of the court of appeals (App. C, pp. 23a-24a, *infra*) was entered on January 20, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the McCarran-Ferguson Act provides:

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance; Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012.

Relevant portions of Sections 5, 6 and 20 of the Federal Trade Commission Act are set out in a statutory addendum (pp. 53a-56a, *infra*).

STATEMENT

It is common for consumer finance companies to offer their customers the chance to buy life insurance or health and accident insurance or both in connection with a loan. The insurance guarantees repayment to the lender and relieves the borrower of the burden of repayment in case

of disabling illness or accident or relieves his estate of the burden in case of his death. This so-called credit insurance is a significant segment of the insurance business. More than $2.5 billion in premiums was paid to several hundred insurance companies for credit insurance in 1981. The question, arising from the Federal Trade Commission's effort to secure judicial enforcement of compulsory process, is whether methods used to sell credit insurance are "the business of insurance" regulated by state law and so removed by the McCarran-Ferguson Act from the FTC's jurisdiction.

Petitioners Dixie Finance Company, Inc., and Tran-South Financial Corporation are consumer finance companies that offer credit insurance to their loan customers. They have corporate affiliations or contractual relationships with insurance companies that underwrite the insurance policies, for which they act as agents. Their employees in local loan offices who solicit the purchase of insurance and issue certificates or policies of insurance to customers are duly appointed agents of those insurance companies. The loan office employees are also licensed insurance agents under the insurance laws of their respective states. Dixie operates in ten states, Tran-South in four of those states and one other. In each of the eleven states where one or the both of the companies operate the sale of credit insurance is regulated by state law, sometimes by provisions special to that kind of in surance and sometimes under general insurance code provisions.[2] All states forbid misrepresentation, deceit and fraud in the sale of insurance.

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[2] An example of the latter is the section of the Louisiana Insurance Code set out in the district court's opinion. (Pp. 3a-5a, *infra*.) Petitioners submitted a collection of pertinent state laws to the district court. Their description of the laws has not been questioned.

In the case of Dixie and TranSouth, the purchase of insurance by a borrower is optional. That fact is affirmatively disclosed by both companies in documents required for arranging or consummating a consumer credit transaction.

For years members of the FTC's staff have pursued suspicions that some consumer finance companies, while professing that credit insurance is optional, induce customers to take insurance by misrepresenting, through their local loan office employees, that the purchase of insurance is a condition to obtaining a loan. The obvious instrument for dealing with such companies seemed at first to be the Truth-in-Lending Act. That statute requires that, when the purchase of insurance is indeed compulsory, the fact must be disclosed and the insurance premium included as a part of the finance charge; on the other hand, where the purchase is optional, that fact must be disclosed in writing and there need only be a separate statement disclosing the amount of the premium if the borrower elects to take the insurance. Truth-in-Lending Act § 106, 15 U.S.C. § 1605. In *USLIFE Credit Corp.* v. *FTC*, 599 F.2d 1387 (5th Cir. 1979), the door was closed on the use of the Truth-in-Lending Act in the cases that the FTC staff was investigating. The court held that the written disclosure that insurance is optional satisfies the Truth-in-Lending Act and any contrary oral representation is not actionable under that statute.

The staff, however, had in reserve Section 5 of the Federal Trade Commission Act, with its broad proscription of unfair or deceptive acts or practices. (P. 53a, *infra*.) Section 5 had already been invoked, before *USLIFE* was decided, as the basis for an order to an automobile dealer to cease and desist from misrepresenting that the purchase of insurance was a condition to

financing the purchase of a car. The FTC's decision in that case was affirmed in an unpublished opinion by the Court of Appeals for the Fourth Circuit. *Peacock Buick, Inc.*, 86 F.T.C. 1532 (1975), *on reconsideration*, 87 F.T.C. 379 (1976), *aff'd per curiam*, *Peacock Buick, Inc.* v. *FTC*, 553 F.2d 97 (4th Cir. 1977) (notation of unpublished opinion only).

In the fall of 1980 the FTC sent copies of the *Peacock Buick* decision to Dixie and TranSouth, 18 other consumer loan companies and 25 automobile dealers. The purpose was to impart the knowledge required by Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(B), added in 1975 by Section 205(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. 88 Stat. 2183. That statute purports to make people liable in certain circumstances for the civil penalties that are prescribed for violations of FTC cease-and-desist orders even though they are subject to no such order. It does so by providing for civil penalties (of up to $10,000 for each violation) for someone engaging in acts, knowing them to be unfair or deceptive, if those same acts have been determined to be unfair or deceptive in a Section 5 proceeding resulting in a cease-and-desist order against someone else. (P. 53a, *infra*.)

The following spring the FTC followed up the *Peacock Buick* mailing by sending to the same companies civil investigative demands, a form of subpoena, calling for extensive documentary material relating to the companies' sales of insurance as an incident to the making of loans or the financing of automobile purchases. The CIDs, authorized by a provision of the FTC Act, Section 20, added by the FTC Improvements Act of 1980, § 13, 94 Stat. 38, 15 U.S.C. § 57b-1, were issued pursuant to a resolution adopted by the Commission authorizing the

use of compulsory process in a nonpublic investigation. The purpose of the investigation was stated to be to determine whether unnamed companies were misrepresenting that the purchase of insurance was a prerequisite to the extension of credit, in violation of Section 5's proscription of unfair or deceptive acts or practices.

Most of the recipients of the CIDs moved administratively to set them aside. They so moved on the ground that the CIDs sought information relating to an aspect of the "business of insurance" regulated by state law; that by virtue of the proviso to Section 2(b) of the McCarran-Ferguson Act (p. 2, *supra*), the FTC may not proceed under Section 5 against conduct that is the "business of insurance" and is regulated by state law; and that, furthermore, the FTC is precluded by Section 6 of the Federal Trade Commission Act, the basic-information gathering section of the Act, as amended in 1980, from even investigating the "business of insurance." The FTC denied these motions with an opinion in which it sought to justify its jurisdiction under Section 5 but indicated that, despite the *USLIFE* decision (p. 4, *supra*), it still yearned for the chance to invoke the Truth-in-Lending Act. (Pp. 25a-37a, *infra*.) It said that the "sole purpose" of its inquiry was to determine whether the companies "may be circumventing the requirements of the Truth-in-Lending Act . . . by orally contradicting written statements provided to applicants for credit which disclose the optional status of credit insurance." (P. 25a, *infra*.) Nevertheless, the only substantive authority ever cited or claimed for the CIDs has been Section 5 of the FTC Act.

Some of the companies that had received the CIDs and whose motions were denied went to court to seek preenforcement relief against the FTC. The FTC has been uniformly successful in having those cases dismissed on

the representation that the plaintiffs' challenge to the agency's authority to issue the CIDs, as limited by McCarran-Ferguson and the amended Section 6, could be heard and determined in proceedings to enforce the CIDs without prejudice to them. Among the cases is a recent decision of the Court of Appeals for the Seventh Circuit, which treated the plaintiff finance companies' attack on the Commission's authority as serious but held that the preenforcement challenge before it was premature. *General Finance Corp.* v. *FTC*, 7th Cir. No. 82-2510, decided Feb. 10, 1983 (App. F, pp. 41a-52a, *infra*); *see also FTC* v. *Manufacturers Hanover Consumer Services, Inc.*, 543 F. Supp. 1071 (E.D. Pa. 1982); *Audubon Life Ins. Co.* v. *FTC*, Civil Action No. 81-952B (M.D. La. Aug. 2, 1982); and *Domestic Finance Corp.* v. *FTC*, Civil Action No. 82-0656 (E.D. Pa. Aug. 3, 1982).

Dixie and TransSouth did await the institution by the FTC of proceedings to enforce their CIDs. The FTC filed its enforcement petition in the District Court for the Eastern District of Louisiana pursuant to Section 20(e) and (h) of the Federal Trade Commission Act, 15 U.S.C. §§ 57b-1(e), (h). After briefing and argument, the district court entered an order enforcing the CIDs. The court ruled that, although the sale of insurance is unquestionably the "business of insurance" within the meaning of the McCarran-Ferguson Act, the Commission may proceed against companies that are suspected of making oral misrepresentations in order to sell insurance if the sales are connected with the extension of credit and are made by finance companies rather than insurance companies. (Pp. 5a, 7a-8a, *infra*.)

On appeal, the majority of the panel wrote that they found "eminently correct" the district court's conclusion that "the conduct being investigated by the Federal

Trade Commission did not relate to respondents as insurers but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the 'business of insurance' . . .." (P. 10a, *infra*.) The court of appeals therefore affirmed on the basis of the district court's opinion, which was set out in full. (Pp. 10a-18a, *infra*.)

Judge Reavley dissented. He said that it was of no import that Dixie and TransSouth "are consumer finance or small loan companies" because the McCarran-Ferguson exemption "is for the 'business of insurance' rather than the 'business of insurers,' " citing this Court's opinion in *Group Life and Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). The proper inquiry, he said, was into the nature of the transactions at issue, and it seemed clear to him that, "[w]hen a finance company tells a borrower/buyer that he must buy an insurance policy in order to complete the desired transaction, the finance company is *selling* insurance." (P. 19a, *infra*; emphasis in original.) He found indistinguishable decisions of two courts of appeals that an insurance company's tying mortgage insurance to mortgage loans was the "business of insurance" (pp. 13-16, *infra*), and he noted that in *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), this Court "held that another method of inducing the purchase of insurance, misleading advertising, was within the McCarran Act exemption." (P. 20a, *infra*.).[3]

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[3] The district court and the court of appeals were clearly correct in ruling on the FTC's authority in this subpoena enforcement case. The issue is one of law and, if petitioners are correct, they have specific statutory protection against being subjected to the FTC's process, deriving both from the McCarran-Ferguson Act and the amended § 6 of the Federal Trade Commission Act itself, 15 U.S.C. § 46(h) (p.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal law in a way that is inconsistent with the decision of this Court in *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), and conflicts with decisions of two courts of appeals, the Second Circuit in *Dexter* v. *Equitable Life Assurance Soc'y*, 527 F.2d 233 (2d Cir. 1975), and the Ninth Circuit in *Addrisi* v. *Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

The question that the court below decided is of immediate practical importance to the FTC, these petitioners, and the numerous other companies, including the parties to the litigation cited above (p. 7, *supra*), that await an authoritative resolution of the issue of the limits on the FTC's authority in this area. It would be wasteful of administrative, judicial and private resources to allow that litigation to proceed and produce the conflicting decisions that the Seventh Circuit has surmised there might very well be, *General Finance Corp.* v. *FTC*, 7th Cir. No. 82-2510, decided Feb. 10, 1983 (pp. 48a-49a, *infra*), before this Court provides an authoritative resolution. We shall show, moreover, that there are existing conflicts

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54a, *infra*). (*See* note 4, *infra*.) In reporting the amendment to § 6, the Senate committee said that it was "intended to permit judicial review on jurisdictional questions [pertaining to the scope of the 'business of insurance'] as now permitted under the court decisions construing the existing exemptions from section 6." S. Rep. No. 500, 96th Cong., 1st Sess. 15 (1979). The committee cited FTC v. Miller, 549 F.2d 542 (7th Cir. 1977), which has been accepted as establishing that, where an agency's request for information clearly violates a statutory right and presents a legal question suitable for a court to decide without the benefit of evidence or agency expertise, plenary review of the agency's authority at the subpoena-enforcement stage is appropriate.

and inconsistencies that should not be allowed to persist, whatever other litigation may be pending.

The question is of fundamental importance, beyond its immediate practical importance, because it pertains to the division of powers between the states and the national government. The McCarran-Ferguson Act effected a particular division of powers. In general, under that statute, where states regulate the "business of insurance," agencies of the federal government may not unless Congress has specifically directed them to do so.

In particular, the Federal Trade Commission may not, under Section 5 of the Federal Trade Commission Act. The McCarran-Ferguson dividing line was drawn anew in bold strokes for the FTC in 1980. Congress, reacting to the FTC's incursions into "business of insurance" territory reserved to the states, amended Section 6 of the FTC Act, 15 U.S.C. § 46, to provide that the Commission may not even investigate, except in circumstances not claimed to obtain here, the "business of insurance."[4] The question

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[4] Section 5 of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 375, added to § 6 of the Federal Trade Commission Act, 15 U.S.C. § 46(h), a sentence reading, "Nothing in this section [with irrelevant exceptions] . . . shall apply to the business of insurance . . .." (P. 54a, *infra*.) Section 6 is the FTC's basic source of authority for acquiring information, and its limitations govern when the new § 20 (p. 5, *supra*) is invoked as it was here for the issuance of civil investigative demands. The amendment to § 6 was a reaction to events described thus in the recent opinion of the Court of Appeals for the Seventh Circuit in General Finance Corp. v. FTC, 7th Cir. No. 82-2510, decided Feb. 10, 1983 (p. 42a, *infra*):

> "In the late 1970s—a feisty era for the Federal Trade Commission, under the controversial chairmanship of Michael Pertschuk—the Commission took the position that the McCarran-Ferguson Act limited only its power to bring cease and desist order proceedings under section 5 of the Federal Trade Commission Act and not its investigatory powers under section 6, and launched a series of investigations of matters plainly

now posed is whether the FTC may step over the dividing line and investigate and proceed against conduct that is the "business of insurance" merely because it also partakes of the "business of credit extension" or some other business within the ambit of the FTC's undoubted power to prevent consumer fraud and deception.

1. In *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), the FTC ordered insurance companies to cease and desist from advertising practices it found to be false, misleading, and deceptive, in violation of Section 5. *Id.* at 561-62. This Court affirmed decisions of two courts of appeals setting aside those orders. It said that the McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws." *Id.* at 563. When, a few years later, the Court undertook to catalog some of

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beyond the reach of section 5 as amended by the McCarran-Ferguson Act—matters such as 'the fairness of risk classification and pricing in the area of private automobile insurance, and . . . the extent to which the Los Angeles insurance market is adequately served.' S. Rep. No. 500, 96th Cong., 1st Sess. 14 (1979). The 1980 amendment to section 6 made the McCarran-Ferguson Act expressly applicable to that section."

We have argued the case and argue it here principally in terms of the FTC's authority under § 5 of the FTC Act, as limited by McCarran-Ferguson, which ultimately defines the agency's law-enforcement investigation authority. S. Rep. No. 500, 96th Cong., 1st Sess. 15 (1979). The least that the amendment to § 6 makes clear is that the FTC has no power to investigate that extends beyond its substantive § 5 authority and that the precise extent of that authority is subject to determination in compulsory process enforcement cases such as this one, as the FTC itself has represented in seeking dismissal of preenforcement challenges to its CIDs (pp. 6-7, *supra*). (See note 3, *supra*.) In the preenforcement cases, such as *General Finance*, the primary focus has been on the limitation newly written into § 6.

the activities that constitute the "business of insurance," it listed near the outset "[t]he selling and advertising of policies" as "within the scope of the statute," citing *National Casualty*. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969). The Senate committee responsible for the 1980 legislation that forbids the FTC to investigate the "business of insurance" reaffirmed the *National Securities* catalog. It wrote that the business of insurance includes "the selling and advertising of policies." S. Rep. No. 500, 96th Cong., 1st Sess. 15 (1979).

The respondents in the *National Casualty* case shipped advertising material containing representations designed to encourage people to buy their insurance policies across state lines to their agents, who then distributed it locally. 357 U.S. at 562. These petitioners deal with prospective purchasers of insurance one-on-one in local small loan offices.

There is a difference between broadside advertising and face-to-face solicitation that is relevant for some legal purposes, *compare Bates* v. *State Bar*, 433 U.S. 350 (1977), *with Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), but we have not heard it suggested that the difference is such as to indicate a greater federal interest in the highly localized personal solicitation than in the advertising. There is no principled way to narrow the rule of the *National Casualty* case to make it mean less than that the FTC or other federal agency has no authority to police state-regulated representations made to induce the purchase of insurance policies. There is the plainest kind of inconsistency, therefore, between the decision below and this Court's *National Casualty* decision.

The prevailing opinion below did not confront *National Casualty* squarely. In the opinion adopted by the majority of the court of appeals, the district court did seem to

lay emphasis on the kind of misrepresentations that the FTC suspects are being made by the employees of these petitioners and to contrast these with representations concerning the terms of an insurance policy. (Pp. 5a, 7a, 8a, *infra*.) It offered no explanation why a representation that someone must purchase an insurance policy to obtain a loan, made to induce the purchase of the policy, is different, for purposes of allocating power between state and federal authorities, from a representation about premiums or benefits, also made to induce the purchase of an insurance policy. We believe that there is no explanation. Moreover, for purposes of the exercise of its undoubted authority over deceit and misrepresentation, the FTC does not recognize any such distinction as the district court seemed to draw. As this Court has remarked, the FTC does not limit itself to policing representations concerning "whether the product, when purchased, will perform up to expectations" but will proceed broadly against "any deceptive methods designed to get a consumer to purchase a product." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 380 (1965).

2. Two disgruntled customers of the Equitable Life Assurance Society, a continent apart, sued the insurer about the same time, making an identical claim: that Equitable, to which each of them had gone for a mortgage loan, insisted that they take a life insurance policy if they wanted the loan. In other words, according to the plaintiffs, Equitable had induced in them the belief that the FTC suspects that the employees of Dixie and TranSouth try to induce in customers who come to them for loans—no insurance, no loan.

The suits against Equitable were for the federal antitrust offense of tying the purchase of one product that the customer wants—here a loan—to a requirement that he

purchase another product that he may not want—here insurance. Both suits ended up in courts of appeals. And both the Second Circuit and the Ninth Circuit held that the conduct laid to Equitable could not be made the basis for liability under the federal antitrust laws because it was the "business of insurance." *Dexter* v. *Equitable Life Assurance Soc'y*, 527 F.2d 233 (2d Cir. 1975); *Addrisi* v. *Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Both courts observed, in the words of one of them, that a "company's methods of inducing people to become policyholders pertain to the company-policyholder relationship and thus constitute an integral part of 'the business of insurance.' " 527 F.2d at 235; *see also* 503 F.2d at 727.

Judge Reavley, dissenting below, said correctly that "[t]he facts here are in effect identical to those in" *Dexter* and *Addrisi*. (P. 19a, *infra*.) The conflict between the decision below and those decisions is square. It cannot be avoided and should be resolved by this Court.

The district court wrote in the opinion adopted by the panel majority that the *Dexter* and *Addrisi* "decisions have lost their viability and are distinguishable in light of the Supreme Court's decision in *Royal Drug [Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205 (1979)] . . . wherein the emphasis was placed on the particular activity being questioned." The court went on to say that in those cases "the practices under attack were being performed by insurance companies and concerned the relationship between the insurer and the policyholder." And further, "were the respondents in this matter insurance companies, the holdings of Dexter and Addrisi might carry more weight." (P. 7a, *infra*.)

Judge Reavley, in his dissent, said of the district court's reasoning (which became the reasoning of his court of appeals colleagues) just about all that need be said: "This looks at the Court's holding in *Royal Drug* upside down." (P. 20a, *infra*.) The Supreme Court held in that case that the McCarran Act exemption is for the "business of insurance" not the "business of insurers," 440 U.S. at 211, which means that "it was irrelevant that the party defendants in *Dexter* and *Addrisi* were themselves insurance companies." (*Id.*) Moreover, though Equitable bears an insurance company's name, its customers were loan customers and not insurance customers, just as much as Dixie's and TranSouth's customers. And Dixie and TranSouth, fellow members with Equitable of the loan industry, are by no means strangers to the insurance industry of which Equitable is also a member. What was said by the Seventh Circuit of identically situated finance companies in *General Finance Corp.* v. *FTC*, No. 82-2510, decided Feb. 10, 1983 (p. 41a, *infra*), is also true of Dixie and TranSouth: "Although they are not insurance companies, they sell credit life insurance, as agents of such companies."

If, therefore, the court below meant that the outcome would have been different in *Dexter* and *Addrisi* if the defendant had been a loan company that also sells insurance, instead of an insurance company that also makes loans, it is mistaken.[5] There is no tenable ground of dis-

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[5] The distinction between an insurance company and a car dealer was the FTC's principal ground for distinguishing *Dexter* and *Addrisi* when those cases were invited to its attention on reconsideration of its *Peacock Buick* decision (pp. 4-5, *supra*). It was only on the petition for reconsideration in that case that a serious McCarran-Ferguson Act argument was mounted. Peacock Buick, Inc., 87 F.T.C. 379 (1976). The FTC has since disavowed the decisional significance

tinction, and this Court should resolve the conflict between the decision below and *Dexter* and *Addrisi*.

3. Throughout this proceeding, there have been suggestions much less specific than the district court's suggestion as to the effect of *Royal Drug* that Judge Reavley disposed of (pp. 14-15, *supra*) about the effect on McCarran-Ferguson law of *Royal Drug* and, more recently, *Union Labor Life Ins. Co.* v. *Pireno*, 102 S. Ct. 3002 (1982) (not cited in the opinion below because it had not been handed down when the district court decided the case). The suggestion seems to be that these cases have so narrowed the reach of McCarran-Ferguson that one must be naive to appeal to the authority of this Court's *National Casualty* opinion or to rely upon court of appeals decisions that antedate *Royal Drug*.

We find the suggestion puzzling. There is certainly nothing explicit in either *Royal Drug* or *Pireno* that casts any doubt on the soundness of *National Casualty* as precedent or on the continued vitality of the rule distilled from it in *National Securities* that the "business of insurance" includes "the selling and advertising of policies." The *Royal Drug* opinion indeed quotes liberally from *National Securities*. 440 U.S. at 211, 215, 216.

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of the distinction. Providence Washington Ins. Co., 89 F.T.C. 345, 401 (1977); Equifax Inc., 96 F.T.C. 844, 1100 (1980), appeal pending. On review of the *Peacock Buick* decision, the court of appeals' disposition of the matter in its unpublished opinion was summary. It stated scarcely more than its bare conclusion that the automobile dealer's conduct was not the business of insurance. It did not attempt to distinguish *Dexter* and *Addrisi*. Peacock Buick, Inc. v. FTC, 553 F.2d 97 (4th Cir. 1977) (notation of unpublished opinion only) (the opinion may be found in 11 C.D. 199 (1977)).

The context of the *Royal Drug* and *Pireno* decisions—the issues in those cases relating as they did to contracts between an insurer and third-party providers of benefits or reviewers of the cost and quality of benefits—did not require any attention to how advertising and selling the basic contract between the insurer and the insured stood as a part of the business of insurance. But the criteria of *Royal Drug* for determining whether a practice is the business of insurance, restated in *Pireno*, do not hint that the selling and advertising of policies is any the less the business of insurance than it was in 1958 when *National Casualty* was decided or 1969 when *National Securities* was decided. The criteria are whether a "practice has the effect of transferring or spreading a policyholder's risk"; whether it "is an integral part of the policy relationship between the insurer and the insured"; and whether it "is limited to entities within the insurance industry." 102 S. Ct. at 3009.

On the face of things, the policyholder's risk is transferred only when the policy is sold; similarly, the insurer-insured relationship is created by the sale of the policy; and nothing is more characteristic of an industry than the means used to sell its product. The Senate committee responsible for the 1980 amendment to Section 6 of the Federal Trade Commission Act prohibiting FTC investigations of the "business of insurance" (note 4 & p.12, *supra*) saw no erosion of the principle of *National Casualty* and *National Securities* by *Royal Drug*. It cited and discussed *Royal Drug* on the very same page of its report on which it said that the business of insurance includes "the selling and advertising of policies." S. Rep. No. 500, 96th Cong., 1st Sess. 15 (1979).

The suggestion that *Royal Drug* has overtaken the *Dexter* and *Addrisi* tying cases—the district court's

statement that those decisions "have lost their viability," for example—is even harder to come to grips with. We simply do not understand what there is in *Royal Drug* (or *Pireno*, for that matter) that would change the outcome of those cases. An insurance company there was accused of using undue influence (instead of fanciful claims, as in *National Casualty*) to induce people to buy its policies. Different people may view the exertion of undue influence as more or less reprehensible than the making of fanciful claims, but neither seems more or less a proper subject for federal rather than state remedial action, given the terms and policy of McCarran-Ferguson.

There is a rather more specific suggestion of the effect of *Royal Drug* in Judge Posner's recent opinion for the Seventh Circuit dismissing a preenforcement challenge to the FTC's CIDs. *General Finance Corp.* v. *FTC*, 7th Cir. No. 82-2510, decided Feb. 10, 1983. That suggestion, we believe, is mistaken in its premise. The court stated in *General Finance* that "[s]elling life insurance as an agent for an insurance company is the business of life insurance in a literal but maybe not the intended [statutory] sense." (P. 48a, *infra*.) It found ground for doubt on the latter score in *Royal Drug*, which it said "gives the Commission some room to argue that it can, without violating the insurance proviso in Section 6,[6] act against misrepresentations in the sale of insurance by companies that are using the misrepresentations to get more finance business rather than more insurance business." (Pp. 48a-49a, *infra*.)

The Commission has certainly used the room that the court said had been given it. It has professed throughout to be investigating only the extension of credit—the

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[6] See note 4, *supra*.

acquisition by these companies of "finance business" and not "insurance business." The district court was so far moved by the FTC argument as to "find that the practices in question induce the purchase of credit" (though the court contradicted its own finding when it also referred to petitioners' "methods of inducing potential borrowers to purchase insurance"). (P. 8a, *infra*.) The district court's "finding" is clearly wrong, and its contradictory reference accurate.

The purpose of the misrepresentations that the FTC suspects, if made, would be to sell insurance, not credit. By hypothesis, the customer is in the finance company's local loan office because he wants, needs, or thinks he needs a loan. He is more even than a potential borrower, as the district court referred to him. In order for a representation that the customer will have to take an insurance policy as a condition to receiving a loan to have any bite, the customer must be a committed borrower. Only reluctantly, if at all, would he walk away without the loan that he came to get. The National Clients Council, in an amicus brief on the FTC's behalf in the court of appeals, decried the fact that "[c]redit insurance is . . . sold to a captive market." It is captive to its buyer-participants' felt need for credit. We are clearly concerned with a method of selling insurance to people to whom credit has already been sold and thus, we submit, with the "business of insurance."

CONCLUSION

The petition should be granted.

Respectfully submitted,

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March 1983

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
No. 82-201
SECTION "A"

FEDERAL TRADE COMMISSION

vs.

DIXIE FINANCE COMPANY, INC, *et al.*

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
June 14 — 3:53 PM — '82
NELSON B. JONES
CLERK

SCHWARTZ, J.

This proceeding was invoked by the Federal Trade Commission (Commission) pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. 57b-1[1] for an order compelling

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[1] (e) Whenever any person fails to comply with any civil investigative demand duly served upon him under this Section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

respondents to comply with civil investigative demands (CIDs) issued by the Commission during the course of an investigation to determine whether respondents may be or may have been engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2).[2] Specifically, the purpose of the investigation is to determine whether finance companies, automobile dealerships or others may be engaged in unfair or deceptive acts or practices in connection with arranging for or consummating of a consumer credit transaction, including misrepresenting, directly or by implication, that the purchase of credit insurance is a prerequisite to the extension of credit.

Respondents have failed to provide the requested documents on the ground that the Commission's inquiry is an unlawful attempt to investigate and regulate the "business of insurance" which is protected by the McCarran-Ferguson Act, 15 U.S.C. 1012(b)[3] (McCarran Act) from review by the Federal Trade Commission.

Exhaustive briefs were filed by all parties and oral argument was heard, after which this matter was taken under submission by the Court. After a review of the arguments and the memoranda, the Court concludes that the information the Commission seeks is not immunized from investigation by the "business insurance" exemption of the McCarran act.

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[2] The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce.

[3] Sec. 2(a) The business of insurance, and every engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

Dixie and TransSouth are consumer finance companies that directly and through corporate affiliates sell life and health and accident insurance to their loan customers. Their position is that any investigation is barred under the McCarran Act since the "sale of insurance incident to a loan transaction is regulated by every state in which Dixie or TransSouth does business." Both companies sell insurance as an incident of their lending activities; both companies allege that since every state in which they sell governs the sale of insurance to borrowers and each state prohibits fraud and deception in any such sale, they clearly fall within the parameters of the McCarran Act exemption. The issue thus becomes whether the actions of the respondents which the Commission seeks to investigate are regulated by state law.

By way of example, the Louisiana Insurance Code, R.S. 22:1211-1217 regulates the trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act, R.S. 22:1214 provides a listing of those methods, acts and practices which are defined as unfair or deceptive. The pertinent provisions for our purposes are R.S. 22:1214(1), (2) and (9) which provide:

> The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentations and false advertising of policy contracts. Making, issuing, or circulating, or causing to be made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any insurer for the purpose of

inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance, or making any representation that the promised coverage is available to groups of persons when such persons do not fall within groups defined in this Code. In case of advertisements of policies providing health, accident, sickness or medical benefits where such policies are either cancellable or renewable at the option of the insurer, such advertisements shall contain a statement to that effect in prominent type, and when details of benefits provided by a particular policy or plan of accident or health insurance are set forth in any advertising material, such advertising material shall disclose the major limitations of such policy or plan as well as the coverage advantage or benefits offered or promised.

(2) False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(9) Requiring as a condition precedent to lending money upon the security of a mortgage on movable or immovable property that the borrower negotiate any policy of insurance covering such property through a particular insurance agent or agents, company or companies, type of company or types of companies, broker or brokers.

Provided, however, that this provision shall not prevent the exercise by any mortgage of his right to approve the insurer selected by the borrower on a reasonable nondiscriminatory basis related to the solvency of the company and its ability to service the policy. The mortgagee may require that the amount of insurance be at least in an amount to protect the amount of the loan on a type of policy furnishing reasonable protection to the mortgagee in a form selected by the borrower which may include additional coverages not inuring to the benefit of the mort-

> gagee and reasonably associated or connected with the property which is the subject of the loan or mortgage. Notwithstanding the provisions of R.S. 22:1212, any lender either directly or indirectly requiring a borrower to furnish insurance upon such property shall be subject to the conditions and prohibitions of this paragraph.

The Commission has stated that its sole objective in the current inquiry "is to determine whether respondents and other companies engaged in the business of consumer financing may be misrepresenting the optional status of credit insurance to prospective borrowers. The Commission has further stated that it is interested solely in "possible misrepresentations concerning the conditions under which a loan will be granted, and not the actual sale or methods of selling credit insurance." The Commission argues that the "business of insurance" is not involved because an insurance policy is only tangentially involved and that none of the elements of the insurer-insured relationship are being scrutinized by the Commission.

These elements were enunciated in *Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067 (1979) as the spreading and underwriting of a policyholder's risk and the contract between the insurer and the insured. In applying *Royal Drug*, the focus must be on the particular activity under attack; here, the possible misrepresentation that the purchase of credit insurance is a prerequisite to the extension of credit. There is no argument that the sale of an insurance policy is undoubtedly the "business of insurance" for McCarran Act purposes. *Cody* v. *Community Loan Corp. of Richmond Cty.*, 606 F.2d 499 (5th Cir. 1979), *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564 (1969). It is not the actual sale, but the fact that the sale is a precondition to the extension of credit that is critical here. Were the Commission attempting to investigate the *sale* of these policies, clearly the state statutes, such as Louisiana's R.S. 22:1212, would govern and the McCarran Act exemption would apply. But the Commission is not investigating any misrepresentations made in connection with the terms of any policy to be issued; rather, it is concerned with the extension of credit. While the offering of such policies in

such a setting may facilitate the sale of insurance policies, that alone does not elevate the activity to the "business of insurance." *Perry* v. *Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979).

The Fifth Circuit has consistently held, in a somewhat different factual setting, that the lending activities are apart from any insurance activities a company may engage in.[4] In determining whether an insurance activity is involved that will invoke the McCarran Act exemption the Fifth Circuit relied upon the guidance provided by the Supreme Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564 (1969) which stated that the relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement are at the core of the "business of insurance." In *Cochran*, supra, the defendant was *not* an insurance company, and the Court found that its activities in financing insurance premiums was not the "business of insurance," since the defendant was only performing the same role that other financing companies did in the consumer sales business. *Cody*, supra, is more on point factually to the situation with which we are faced. In *Cody* a loan corporation offered cancer insurance for sale in its loan offices. The Court acknowledged that the sale of an insurance policy is undoubtedly the "business of Insurance" for McCarran Act purposes. However, it further stated that the lending activities of an insurance company are apart from that business: "the financing activity is purely ancillary to the insurance relationship between the insurance company and the policyholder," citing *Perry* supra, at 470.

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[4] See *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), *Perry* v. *Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5th Cir. 1979), and *Cody* v. *Community Loan Corp. of Richmond Cty.*, 606 F.2d 499 (5th Cir. 1979) which concern premium financing and credit sales of insurance policies.

Applying the analysis established by the Fifth Circuit to the instant case leads us to conclude that the relationship involved between Dixie Finance and TransSouth and its customers which the Commission seeks to investigate is *not* the relationship between insurer and insured. It is the *credit* relationship that the Commission is concerned with; specifically, whether the sale of insurance is a precondition to the arrangement of credit. The "business of insurance" intrudes upon the business of financing only at the point at which the borrower or his lender deal with the insurer regarding the particulars of the policy being purchased. *Peacock Buick, Inc.* v. *FTC*, 86 F.T.C., 1532 (1975), on reconsideration, 87 F.T.C., 379 (1976), affirmed *Mem.*, 553 F.2d 97 (4th Cir. 1977).

The Specifications set out by the Commission in its CIDs do not intrude on the insurer-insured relationship; they seek to determine only whether respondents may be making false or misleading misrepresentations to prospective borrowers that credit insurance is a prerequisite to the extension of consumer credit. The Commission is not concerned with the "reliability, interpretation and enforcement" of the insurance contract. See *National Securities*, supra.

Respondents rely on interpretations of the insurer-insured relationship by the Second and Ninth Circuits in *Addrisi* v. *Equitable Life Assurance Society of U.S.*, 503 F.2d 725 (9th Cir. 1974) and *Dexter* v. *Equitable Life Assurance Society of U.S.*, 527 F.2d 233 (2nd Cir. 1975). We feel that these decisions have lost their viability and are distinguishable in light of the Supreme Court's decision in *Royal Drug*, supra, wherein the emphasis was placed on the particular activity being questioned. In both Dexter and Addrisi the practices under attack were being performed by insurance companies and concerned the relationship between the insurer and the policyholder. Were the respondents in this matter insurance companies, the holdings of *Dexter* and *Addrisi* might carry more weight. But under the dictates of *Royal Drug* we are required to limit our determination as to the "business of insurance" to the discrete conduct in question. We conclude that the conduct being in-

vestigated does not relate to respondents as insurers, but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the "business of insurance." As so succinctly stated in *Royal Drug*, "the exemption is for the 'business of insurance,' not the 'business of insurers.' "[5]

As we find that the respondents are in the business of extending credit, not insurance coverage, and that the investigation of the sale of any insurance relates to the arrangement of credit between the respondents and prospective borrowers, such sales are subject to inquiry by the Federal Trade Commission to the extent that the inquiry is limited to the Specifications enumerated in the CIDs. The scope of the investigation is not protected by the McCarran-Ferguson Act, since we find that the practices in question induce the purchase of credit and as such are not the "business of insurance" within the meaning of that Act.

As we find that the Commission's investigation is proper under section 5(a) of the FTC Act, 15 U.S.C. 45(a)(2), we do not address respondents' other arguments as to the applicability of the Truth-In-Lending Act, or as to the Commission's right to secure the information it seeks through compulsory process.

Accordingly, it is ordered that Dixie Finance Company and TransSouth produce the documentary evidence as required in the civil investigative demand issued to respondents.

New Orleans, Louisiana, this 14th day of June, 1982.

/s/ Charles Schwartz, Jr.
CHARLES SCHWARTZ, JR.
UNITED STATES DISTRICT JUDGE

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[5] *Royal Drug*, supra, 440 U.S. at 211, 99 S. Ct. at 1073.

APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Jan. 20, 1983

No. 82-3404.

FEDERAL TRADE COMMISSION
Petitioner-Appellee,

v.

DIXIE FINANCE COMPANY, INC. and
Transouth Financial Corporation,
Respondents-Appellants.

Federal Trade Commission sought an order compelling consumer finance companies to comply with civil investigative demands issued by Commission during course of an investigation to determine whether companies might be or might have been engaged in unfair or deceptive acts or practices. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., entered judgment in favor of Commission, ordering finance companies to produce documentary evidence as required in civil investigative demands issued to them. An appeal was taken. The Court of Appeals, Garza, Circuit Judge, held that investigation into whether sale of insurance by consumer finance companies with insurance affiliates was a precondition to arrangement of credit was not an investigation of companies as insurers but as finance companies whose methods of inducing potential borrowers to purchase insurance were an integral part of arrangement of credit and not "business of insurance" and, as such, investigation was not barred by "business of insurance" exemption of McCarran Act.

Affirmed.

Reavley, Circuit Judge, dissented and filed an opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, REAVLEY and TATE, Circuit Judges.

GARZA, Circuit Judge:

Finding that the conclusion of the court below that the conduct being investigated by the Federal Trade Commission did not relate to respondents as insurers but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the "business of insurance" was eminently correct, we affirm this caes on the basis of Judge Charles Schwartz's opinion of June 14, 1982, attached hereto as Appendix "A".

AFFIRMED.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
No. 82-201
SECTION "A"

FEDERAL TRADE COMMISSION

vs.

DIXIE FINANCE COMPANY, INC, *et al.*

CHARLES SCHWARTZ, Jr., District Judge.

This proceeding was invoked by the Federal Trade Commission (Commission) pursuant to Section 20 of the Federal Trade

Commission Act, 15 U.S.C. 57b-1[1] for an order compelling respondents to comply with civil investigative demands (CIDs) issued by the Commission during the course of an investigation to determine whether respondents may be or may have been engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2).[2] Specifically, the purpose of the investigation is to determine whether finance companies, automobile dealerships or others may be engaged in unfair or deceptive acts or practices in connection with arranging for or consummating of a consumer credit transaction, including misrepresenting, directly or by implication, that the purchase of credit insurance is a prerequisite to the extension of credit.

Respondents have failed to provide the requested documents on the ground that the Commission's inquiry is an unlawful attempt to investigate and regulate the "business of insurance" which is protected by the McCarran-Ferguson Act, 15 U.S.C. 1012(b)[3] (McCarran Act) from review by the Federal Trade Commission.

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[1] (e) Whenever any person fails to comply with any civil investigative demand duly served upon him under this Section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

[2] The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce.

[3] Sec. 2(a) The business of insurance, and every engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulat-

Exhaustive briefs were filed by all parties and oral argument was heard, after which this matter was taken under submission by the Court. After a review of the arguments and the memoranda, the Court concludes that the information the Commission seeks is not immunized from investigation by the "business of insurance" exemption of the McCarran Act.

Dixie and TransSouth are consumer finance companies that directly and through corporate affiliates sell life and health and accident insurance to their loan customers. Their position is that any investigation is barred under the McCarran Act since the "sale of insurance incident to a loan transaction is regulated by every state in which Dixie or TransSouth does business." Both companies sell insurance as an incident of their lending activities; both companies allege that since every state in which they sell governs the sale of insurance to borrowers and each state prohibits fraud and deception in any such sale, they clearly fall within the parameters of the McCarran Act exemption. The issue thus becomes whether the actions of the respondents which the Commission seeks to investigate are regulated by state law.

By way of example, the Louisiana Insurance Code, R.S. 22:1211-1217 regulates the trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act; R.S. 22:1214 provides a listing of those methods, acts and practices which are defined as unfair or deceptive. The pertinent provisions for our purposes are R.S. 22:1214(1), (2) and (9) which provide:

> The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentation and false advertising of policy contracts. Making, issuing, or circulating, or causing to be

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ing the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any insurer for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance, or making any representation that the promised coverage is available to groups of persons when such persons do not fall within groups defined in this Code. In case of advertisements of policies providing health, accident, sickness or medical benefits where such policies are either cancellable or renewable at the option of the insurer, such advertisements shall contain a statement to that effect in prominent type, and when details of benefits provided by a particular policy or plan of accident or health insurance are set forth in any advertising material, such advertising material shall disclose the major limitations of such policy or plan as well as the coverage advantage or benefits offered or promised.

(2) False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(9) Requiring as a condition precedent to lending money upon the security of a mortgage on movable or immovable property that the borrower negotiate any poli-

> cy of insurance covering such property through a particular insurance agent or agents, company or companies, type of company or types of companies, broker or brokers. Provided, however, that this provision shall not prevent the exercise by any mortgagee of his right to approve the insurer selected by the borrower on a reasonable nondiscriminatory basis related to the solvency of the company and its ability to service the policy. The mortgagee may require that the amount of insurance be at least in an amount to protect the amount of the loan on a type of policy furnishing reasonable protection to the mortgagee in a form selected by the borrower which may include additional coverages not inuring to the benefit of the mortgagee and reasonably associated or connected with the property which is the subject of the loan or mortgage. Notwithstanding the provisions of R.S. 22:1212, any lender either directly or indirectly requiring a borrower to furnish insurance upon such property shall be subject to the conditions and prohibitions of this paragraph.

The Commission has stated that its sole objective in the current inquiry, "is to determine whether respondents and other companies engaged in the business of consumer financing may be misrepresenting the optional status of credit insurance to prospective borrowers. The Commission has further stated that it is interested solely in "possible misrepresentations concerning the conditions under which a loan will be granted, and not the actual sale or methods of selling credit insurance." The Commission argues that the "business of insurance" is not involved because an insurance policy is only tangentially involved and that none of the elements of the insurer-insured relationship are being scrutinized by the Commission.

These elements were enunciated in *Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205, 99 S.Ct 1067, 59 L.Ed.2d 261 (1979) as the spreading and underwriting of a policyholder's risk and the contract between the insurer and the insured. In applying *Royal Drug*, the focus must be on the particular activity under attack; here, the possible misrepresentation that the purchase of credit insurance is a prerequisite to the extension of credit. There is no argument that the sale of an insurance policy is undoubtedly the "busi-

ness of insurance" for McCarran Act purposes. *Cody* v. *Community Loan Corp. of Richmond Cty.*, 606 F.2d 499 (5th Cir. 1979), *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). It is not the actual sale, but the fact that the sale is a precondition to the extension of credit that is critical here. Were the Commission attempting to investigate the *sale* of these policies, clearly the state statutes, such as Louisiana's R.S. 22:1212, would govern and the McCarran Act exemption would apply. But the Commission is not investigating any misrepresentations made in connections with the terms of any policy to be issued; rather, it is concerned with the extension of credit. While the offering of such policies in such a setting may facilitate the sale of insurance policies, that alone does not elevate the activity to the "business of insurance." *Perry* v. *Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979).

The Fifth Circuit has consistently held, in a somewhat different factual setting, that the lending activities are apart from any insurance policies a company may engage in.[4] In determining whether an insurance activity is involved that will will invoke the McCarran Act exemption the Fifth Circuit relied upon the guidance provided by the Supreme Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969) which stated that the relationship between the insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement are at the core of the "business of insurance." In *Cochran*, supra, the defendant was *not* an insurance company, and the Court found that its activities in financing insurance premiums was not the "business of insurance," since the defendant was only performing the same role that other financing companies did in the

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[4] See *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), *Perry* v. *Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5th Cir. 1979), and *Cody* v. *Community Loan Corp. of Richmond Cty.*, 606 F.2d 499 (5th Cir. 1979) which concern premium financing and credit sales of insurance policies.

consumer sales business. *Cody*, supra, is more on point factually to the situation with which we are faced. In *Cody* a loan corporation offered cancer insurance for sale in its loan offices. The Court acknowledged that the sale of an insurance policy is undoubtedly the "business of Insurance" for McCarran Act purposes. However, it further stated that the lending activities of an insurance company are apart from that business: "the financing activity is purely anciilary to the insurance relationship between the insurance company and the policyholder," citing *Perry* supra, at 470.

Applying the analysis established by the Fifth Circuit to the instant case leads us to conclude that the relationship involved between Dixie Finance and TransSouth and its customers which the Commission seeks to investigate is *not* the relationship between insurer and insured. It is the *credit* relationship that the Commission is concerned with; specifically, whether the sale of insurance is a precondition to the arrangement of credit. The "business of insurance" intrudes upon the business of financing only at the point at which the borrower or his lender deal with the insurer regarding the particulars of the policy being purchased. *Peacock Buick, Inc.* v. *FTC*, 86 F.T.C., 1532 (1975), on reconsideration, 87 F.T.C., 379 (1976), affirmed *Mem.*, 553 F.2d 97 (4th Cir. 1977).

The Specifications set out by the Commission in its CIDs do not intrude on the insurer-insured relationship; they seek to determine only whether respondents may be making false or misleading misrepresentations to prospective borrowers that credit insurance is a prerequisite to the extension of consumer credit. The Commission is not concerned with the "reliability, interpretation and enforcement" of the insurance contract. See *National Securities*, supra.

Respondents rely on interpretations of the insurer-insured relationship by the Second and Ninth Circuits in *Addrisi* v. *Equitable Life Assurance Society of U.S.*, 503 F.2d 725 (9th Cir. 1974) and *Dexter* v. *Equitable Life Assurance Society of U.S.*, 527 F.2d 233 (2nd Cir. 1975). We feel that these decisions

have lost their viability and are distinguishable in light of the Supreme Court's decision in *Royal Drug*, supra, wherein the emphasis was placed on the particular activity being questioned. In both Dexter and Addrisi the practices under attack were being performed by insurance companies and concerned the relationship between the insurer and the policyholder. Were the respondents in this matter insurance companies, the holdings of *Dexter* and *Addrisi* might carry more weight. But under the dictates of *Royal Drug* we are required to limit our determination as to the "business of insurance" to the discrete conduct in question. We conclude that the conduct being investigated does not relate to respondents as insurers, but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the "business of insurance." As so succinctly stated in *Royal Drug*, "The exemption is for the 'business of insurance,' not the 'business of insurers.' "[5]

As we find that the respondents are in the business of extending credit, not insurance coverage, and that the investigation of the sale of any insurance relates to the arrangement of credit between the respondents and prospective borrowers, such sales are subject to inquiry by the Federal Trade Commission to the extent that the inquiry is limited to the Specifications enumerated in the CIDs. The scope of the investigation is not protected by the McCarran-Ferguson Act, since we find that the practices in question induce the purchase of credit and

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[5] *Royal Drug*, supra, 440 U.S. at 211, 99 S. Ct. at 1073.

1. The exemption provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, . . . That the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

15 U.S.C. § 1012(b).

as such are not the "business of insurance" within the meaning of that Act.

As we find that the Commission's investigation is proper under section 5(a) of the FTC Act, 15 U.S.C. 45(a)(2), we do not address respondents' other arguments as to the applicability of the Truth-In-Lending Act, or as to the Commission's right to secure the information it seeks through compulsory process.

Accordingly, it is ordered that Dixie Finance Company and TransSouth produce the documentary evidence as required in the civil investigative demand issued to respondents.

New Orleans, Louisiana, this 14th day of June, 1982.

REAVLEY, Circuit Judge, dissenting:

Our question is whether § 2(b) of the McCarran-Ferguson Act (the "McCarran-Ferguson Act"), 15 U.S.C. § 1012(b), bars the application of disclosure provisions of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45 when a finance company allegedly requires its loan customers to purchase insurance policies through the finance company by falsely representing to the customer that the purchase of insurance is a prerequisite to obtaining a loan. I would hold that the McCarran Act does bar application of the provisions of the FTC Act.

It is now well-established that the McCarran Act exemption[1] is for the "business of insurance" rather than the "business of insurers." *Group Life & Health Insurance* v. *Royal Drug Co.*, 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L.Ed.2d 261 (1979). Thus, it is of no import here that the defendants are consumer finance or small loan companies; the relevant inquiry is into the *nature* of the transactions at issue. *Perry* v. *Fidelity Union Life Insurance Co.*, 606 F.2d 468, 470 (5th Cir. 1979), *cert. denied*, 446 U.S. 987, 100 S.Ct. 2973, 64 L.Ed.2d 845 (1980). This court has previously held that a loan company's *selling* of cancer insurance policies constituted the "business of insurance" for McCarran Act purposes, although its *financing* of the premium did not; in other words, the mere fact that the loan company sold the policies it financed did not preclude applica-

tion of the Truth-In-Lending Act to the credit feature of the transaction, since the financing alone was insufficient to invoke the McCarran Act exemption. *Cody* v. *Community Loan Corporation*, 606 F.2d 499, 503 (5th Cir. 1979), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2973, 64 L.Ed.2d 846 (1980). When a finance company tells a borrower/buyer that he must buy an insurance policy in order to complete the desired transaction, the finance company is *selling* insurance. If the borrower/buyer accedes to the selling tactic and agrees to buy the insurance, only then does the activity move to the financing of the cost of that insurance.

The facts here are in effect identical to those in *Dexter* v. *Equitable Life Assurance Society*, 527 F.2d 233 (2d Cir. 1975) and *Addrisi* v. *Equitable Life Assurance Society*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975). Both of these cases held that the tying of insurance policies to mortgage loans, whereby persons obtaining such loans were *required* to buy life insurance from the lender, constituted the "business of insurance" for McCarran Act purposes, thus precluding application of federal antitrust laws to invalidate the tying arrangements. The fact that the customers were required to buy insurance was of critical significance:

> Even if we agreed with plaintiffs that the lending of mortgage money by an insurance company does not in itself constitute "the business of insurance" and so is subject to the antitrust laws, a question we need not decide here, the very basis of the Dexter's complaint is that Equitable used the mortgage loan to coerce the purchase of an insurance policy. Forcing people to buy insurance may well be an undesirable practice—and we do not suggest that we approve of it—but it is part of "the business of insurance." . . . An insurance company's methods of inducing people to become policyholders pertain to the company-policyholder relationship, and thus constitute an integral part of "the business of insurance."

Dexter, 527 F.2d at 235 (footnote omitted).

The district court below felt that *Dexter* and *Addrisi* had "lost their viability and [were] distinguishable in light of the Supreme Court's decision in *Royal Drug*, supra, wherein the emphasis was placed on the particular activity being questioned. In both *Dexter* [sic] and *Addrisi* [sic] the practices under attack were being performed by insurance companies and concerned the relationship between the insurer and the policyholder. Were the respondents in this matter insurance companies, the holdings of *Dexter* and *Addrisi* might carry more weight." This looks at the Court's holding in *Royal Drug* upside down. The Supreme Court in that case held that the McCarran Act exemption is for the "business of insurance," not the "business of insurers," which means to me that it was irrelevant that the party defendants in *Dexter* and *Addrisi* were themselves insurance companies.

This court has implied that a loan company's inducing or requiring customers to purchase insurance constitutes the "business of insurance." In distinguishing the applicability of *Dexter* and *Addrisi* in one case where an insurance company provided premium financing in connection with the sale of insurance policies, the *Perry* court wrote that "in these cases the inducement was actually a requirement, and forcing prospective policyholders to buy insurance cannot be equated with making the purchase 'easier' by offering premium financing." *Perry*, 606 F.2d at 470-71 n. 6. In the situation here, where customers of the finance companies have been falsely informed that the purchase of insurance is a mandatory prerequisite to the obtaining of a loan, the *Perry* court's rationale for distinguishing *Dexter* and *Addrisi* would require us to reach a contrary result. This conclusion is supported by *FTC* v. *National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), where the Supreme Court held that another method of inducing the purchase of insurance, misleading advertising, was within the McCarran Act exemption.

I would hold that the sale of an insurance policy, induced by the true or false representation that its purchase is necessary to obtain a loan, constitutes the "business of insurance," thus

triggering the McCarran Act exemption and precluding application of federal antitrust law or the FTC Act's provisions on unfair or deceptive acts. Furthermore, I would hold that the "business of insurance" as it is presented here regulated by the state law and that application of the FTC Act would "invalidate, impair, or supercede" such state law in contravention of the McCarran Act exemption. The district court's opinion analyzed how Louisiana insurance law would regulate the practices complained of in this case. *See* La.Rev.Stat.Ann. §§ 22:1214(1), (2), (9) (West 1978). Moreover, even if some of the states in which the defendants conduct their insurance business do not prohibit the practices now complained of, it does not follow that such activities are thereby "unregulated" by a state or that application of the FTC Act would not "invalidate, impair or supercede" state law. *See Perry*, 606 F.2d at 478-84 (Brown, J., dissenting); *Dexter*, 527 F.2d at 235-36.

While I certainly do not condone the practice of finance companies falsely informing their customers that the purchase of insurance is a prerequisite to obtaining a loan, activities of this sort, involving (as I believe they do) the "business of insurance" may only be regulated by the states, and not by application of the FTC Act in contravention to the clear dictate of the McCarran Act exemption.

I respectfully dissent.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 82-3404

D.C. Docket No. CA 82-201 "A"

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

DIXIE FINANCE COMPANY, INC.
and TRANSOUTH FINANCE CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GARZA, REAVLEY and TATE, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

JANUARY 20, 1983

REAVLEY, Circuit Judges, dissenting.

ISSUED AS MANDATE:

OP-JDT-9
Rev. 6/82

APPENDIX D

Statement Of The Commission On Petitions To Quash The Civil Investigative Demands Issued In The Credit Insurance Investigation

File No. 802 3199

The Federal Trade Commission is currently conducting an investigation of finance companies and automobile dealerships to determine whether certain creditors are making false or misleading representations in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to consumers concerning the necessity of purchasing credit insurance as a condition to obtaining financing. On September 14, 1980, the Commission issued a resolution authorizing compulsory process. Under the authority of this resolution, Civil Investigative Demands ("CIDs") were issued for the production of documentary materials to forty-three automobile dealerships and finance companies. Twenty of the respondents* filed petitions to quash the CIDs pursuant to Section 2.7(d) of the Commission's Rules of Practice ("Rules") (16 C.F.R. § 2.7(d)) in which they argued that Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46, and the McCarran-Ferguson Act, 15 U.S.C. § 1012, preclude this investigation. These petitions are denied for reasons set forth both in the individual letter responses and in the statement below.

I.

The sole purpose of the current inquiry is to determine whether certain companies in the business of arranging or extending loans may be circumventing the requirements of the Truth-In-Lending Act, 15 U.S.C. § 1601 *et seq.*, ("TILA") and its implementing Regulation Z, 12 C.F.R. § 226.1 *et seq.* (1978), by orally contradicting written statements provided to applicants for credit which disclose the optional status of credit

*The following respondents have filed petitions: Lou Fusz Motor Co.; Lustine Chevrolet, Inc.; Rosenthal Chevrolet Company; Toyota Town of Point Pleasant, Inc.; Bay Volkswagen, Ltd; Sheehy Ford,

insurance.[1] Such misrepresentations may deceive consumers both as to the conditions under which a loan will be granted and the actual costs of obtaining credit, and, as such, would constitute unfair or deceptive trade practices in violation of Section 5 of the FTC Act.

As is more fully explained below, the McCarran-Ferguson Act (15 U.S.C. § 1011, *et seq.*) ("McCarran Act")[2] does not preclude the instant investigation by the Commission to deter-

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Inc.; Paul Miller Ford; Fairfax Chrysler-Plymouth World, Inc.; Beneficial Corporation; Manufacturers Hanover Consumer Services, Inc.; Credithrift Financial Incorporated; Sunamerica Financial Corporation; Domestic Finance Corporation; Credico Financial, Inc.; General Finance Corporation; Postal Finance Company; Barclays-AmericanCorporation; Transouth Financial Corporation; Dixie Finance Co.; Commercial Securities Company, Inc. CIDs were issued to these companies on April 29, 1981. Due to extensions of time granted by staff to various respondents for compliance purposes, petitions to quash were timely received by the Commission between May 22, 1981 and August 10, 1981.

[1] The Commission's resolution directing compulsory process states in relevant part:

Nature and Scope of Investigation:

To determine whether certain unnamed finance companies, car dealerships and others may be engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, in connection with the arranging for or consummating a consumer credit transaction in or affecting commerce, including but not limited to misrepresenting, directly or by implication, that the purchase of credit insurance is a prerequisite to the extension of credit.

[2] The McCarran-Ferguson Act provides in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, * * * the Federal Trade Commission Act, as amended * * *, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

mine whether auto dealerships and finance companies are misrepresenting the need to purchase credit insurance in order to obtain an extension of credit. Section 2(b) of the McCarran Act, 15 U.S.C. § 1012(b), prohibits Commission actions under the Federal Trade Commission Act[3] only to the extent that the challenged activity constitutes the "business of insurance" and is regulated by State law.[4]

The Supreme Court has stated that, in creating the McCarran Act exemption for the "business of insurance,"

> Congress was concerned with the type of state regulation that centers around the contract of insurance * * *. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance."

SEC v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969)[5] Recently, in *Group Life & Health Insurance Co.* v. *Royal*

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[3] The Commission's authority to conduct this investigation derives from Sections 6, 9, 10 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50 and 57b-1 as amended. Section 6 of the Act, as amended by Section 5 of the FTC Improvements Act of 1980, 94 Stat. 374, 375, makes clear that the McCarran Act is intended to apply to Commission investigations, as well as to law enforcement actions under the FTC Act. For a discussion of the Commissions' findings regarding the limitations placed by Section 6 on investigations of the "business of insurance", see pages 13-16, *infra*.

[4] Petitioners also argue that the practices at issue here are regulated by State law in all states where petitioners are licensed to do business. However, the threshhold inquiry under the McCarran Act is whether or not the challenged practices constitute the "business of insurance." Inasmuch as the Commission concludes in this letter ruling that the misrepresentations which are the subject of this investigation do not fall within the definition of the "business of insurance," it is unnecessary for the Commission to determine further whether these practices are also "regulated by State law."

[5] The legislative history of the McCarran Act emphasizes the importance of the Act in permitting joint ratemaking by insurance companies, strongly suggesting that it was these activities (*i.e.*,

Drug Co., 440 U.S. 205 (1979), the Supreme Court further refined its interpretation of the "business of insurance," concluding that "[t]he primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk." *Id.* at 211. *Accord, Pireno* v. *New York State Chiropractic Association*, No. 80-7507 (2d Cir. 1981); *see also SEC* v. *Variable Annuity Co.*, 359 U.S. 65 (1958). The Commission has stated that for a McCarran Act exemption to apply after *Royal Drug*, "[t]he practices themselves must be the business of insurance in that they directly relate to the contract between the insurer and the insured and involved the underwriting or spreading of risk." *Equifax, Inc.*, 96 F.T.C. 844 (1980).

The current investigation by the Commission falls well outside the corridor of protection furnished to the "business of insurance" by the McCarran Act. Here, the Commission's intent is to ascertain whether car dealerships and finance companies are misrepresenting to potential credit consumers that credit insurance is a prerequisite to receipt of a loan. Such representations by lending institutions and car vendors have no connection with the business of insuring the public against loss or with the actual terms of individual insurance policies. They have much to do, however, with the lender-borrower relationship and with the credit applicant's understanding of the conditions for and costs of receiving credit. Without accurate loan information, potential borrowers are precluded from

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those which would help ensure the solvency of insurance companies) which Congress intended to protect from federal antitrust law scrutiny. *See, e.g.*, 91 Cong. Rec. 1481 (1945); *See also* Group Life & Health Insurance v. Royal Drug Co., supra, 44 U.S. at 221-24.

As noted by the Supreme Court in *Royal Drug*, prior to the passage of the McCarran Act, Congress expressly considered and rejected a bill that would have given insurance companies a blanket exemption from the antitrust laws (including the FTC Act). The Court concluded that Congress intended the scope of the "business of insurance" exemption to be more narrow than that of the rejected provision. *Id.* at 218-220.

fully comprehending the lender's terms of doing business and are foreclosed from effective comparison shopping opportunities. Accordingly, the Commission finds that any such misrepresentations clearly fall within its broad authority under the FTC Act to investigate and police unfair or deceptive trade practices, and do not intrude upon the "business of insurance."

The United States Court of Appeals for the Fourth Circuit has affirmed on McCarran Act grounds a Commission determination that comparable representations made by car dealerships in conjunction with automobile financing arrangements do not constitute the "business of insurance" and are subject to the Commission's authority under the FTC Act. *Peacock Buick, Inc., et al.*, 86 F.T.C. 1532 (1975); 87 F.T.C. 379 (1976), *aff'd per curiam Peacock Buick, et al.* v. *FTC*, No. 76-1287 (4th Cir., April 1, 1977).[6] In analyzing the conduct at issue in *Peacock*, the Commission found that "what is essentially involved is the arrangement of credit by an automobile vendor" and that the "misrepresentations did not deal with the terms of an insurance policy, nor bear in any way upon the relationship between an insurer and its insured." *Id.* at 379 and 381 (emphasis in original). The Commission's determination in *Peacock* regarding false and misleading representations by auto vendors as to the necessity of purchasing credit insurance is equally applicable to representations concerning credit insurance made by lending institutions in conjunction with the extension of consumer credit.[7]

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[6] In an unreported decision, the Fourth Circuit, citing *SEC* v. *National Securities, Inc., supra*, 393 U.S. at 460, stated that oral misrepresentations regarding the need to purchase credit life insurance are "clearly within the jurisdictional ambit of the FTC" and that auto dealers making such representations are "not engaged in the 'business of insurance', insofar as that business contemplates the relationship between insurer and insured".

[7] Although the facts inb *Peacock* involved vendor-arranged financing with third party financial institutions, the Commission perceives no basis for limiting its holding to one particular form of consumer

Cases cited by petitioners in support of their contention that the Commission's investigation concerns the "business of insurance" are inapposite to the present inquiry. Both *Dexter* v. *Equitable Life Assurance Society of the United States*, 527 F.2d 233 (2d Cir. 1975), and *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), were fully considered and rejected by the Commission in reaching its determination in *Peacock*. There, the Commission stated that

> [t]he cases cited by respondent, and others on this subject, have sought to define the "business of insurance" in terms of certain activities of *insurance companies* or *insurers* * * *. The transactions of a company whose principal purpose is to sell insurance are, after all, those most likely to involve primarily the interests which Congress intended be left to state regulation. Where, as here, we deal with a company which is not an insurance company at all, whose business touches on insurance in only a small way, the utmost care must be exercised to ensure that predominantly non-insurance aspects of the business are not immunized from federal supervision by the mere presence of an aleatory contract."

Peacock Buick, Inc., supra, 87 F.T.C. at 81 (emphasis in original); *see Providence Washington Insurance Company, et al.*, 89 FTC 345, 401 (1977); *Equivax, Inc., supra*, 96 F.T.C. at 1101; *see also, SEC* v. *National Securities, Inc., supra*, 393 U.S. 450, at 460 ("whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. * * *").[8]

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credit transaction. Moreover, dictum in *Peacock* suggests a more general application of that ruling. There, the Commission stated that to find misrepresentations such as those made by the auto dealers to be within the purview of the "business of insurance" would "do much to thwart the clear federal interest in preventing deception in the sale of automobiles in or affecting commerce and in credit financing generally." Peacock Buick, Inc. *supra*, 87 F.T.C. at 380.

[8] In *Dexter* and *Addrisi*, antitrust cases involving the tying of insurance to mortgage loans, the courts found that the methods used

The Commission recognizes that the "business of insurance" is not necessarily limited to the affairs of insurance companies (*see, e.g., Equifax, Inc., supra*, 96 F.T.C. at 1100).[9] Neverthe-

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by insurance companies to induce the purchase of credit insurance policies fall within the parameters of "the business of insurance". Significantly, neither court reached its determination on the basis of the risk spreading function identified as being particularly important in *Royal Drug*, and at least one post-*Royal Drug* commentator believes that these tying cases would be decided differently now. *See* "The Definition of the Business of Insurance under the McCarran Ferguson Act after Royal Drug", 800 Colum. l. Rev. 1475 (1980). More importantly, however, these and similar cases involving tactics by which an insurer induces the purchase of its own policy are not relevant to the Commission's investigation of unfair or deceptive credit practices by auto dealers and finance companies.

[9] A corollary to this is that not all of the activities of insurance companies are exempt under the McCarran Act. SEC v. National Securities, Inc., *supra*, 393 U.S. 453; Group Life & Health Insurance Co. v. Royal Drug Co., *supra*, 440 U.S. 205 (insurance company agreement with third party provider that does not involve the spreading of risk does not constitute the business of insurance); *see* Providence Washington Insurance Co., 89 F.T.C. 345 (1977) (premium financing activities of a wholly owned subsidiary of an insurance company do not constitute the "business of insurance); Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468 (5th Cir. 1979); Cody v. Community Loan Corp., 606 F.2d 499 (5th Cir. 1979). *But see* Lowe v. Aarco American, Inc., 536 F.2d 1160 (7th Cir. 1976) (premium financing activities of insurer are part of the "business of insurance); *see also* Gerlach v. Allstate Insurance Co., 338 F. Supp. 642 (S.D. Fla. 1972).

With the exception of *National Securities* and *Royal Drug*, the holdings in these cases, which involve the premium financing activities of insurers or lenders in the sale of insurance policies, are not directly relevant to this investigation. Although certain petitioners refer to language in these cases suggesting that the activities related to the sale of insurance policies may constitute the "business of insurance", none of these courts had before it or determined the question of whether representations by finance companies or car

less, application of any exception to the activities of non-insurers must be a carefully focused one, limited only to those activities involving the insurer-insured relationship and practices relating to the allocation of risk. Here, the Commission's interest in investigating certain credit practices lies not in the relationship of representations concerning the need to purchase credit insurance to the ultimate purchase of an insurance policy or in matters pertaining to its reliability, coverage or enforcement, but in the finance company's or auto dealer's contradiction of the written disclosures required under the Truth-In-Lending Act regarding the optional nature of credit insurance and costs of credit generally.[10] Such misrepresentations by a lender or a third party making loan arrangements to a potential borrower are most properly characterized for the purposes of the instant investigation as the business of extend-

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dealers regarding the necessity of buying credit insurance in order to receive a loan fall within the insurance business. Cases regarding the activities of insurance agents and the manner in which such practices relate to the insurer-insured relationship are similarly inapposite here. *See, e.g.*, Thompson v. New York Life Insurance Company, No. 807458 (5th Cir. 1981); *see also* Group Life & Health Insurance Co. v. Royal Drug Co., *supra*, 440 U.S. at 224-225 n.32.

[10] The primary goal of TILA is to promote "the informed use of credit" by insuring "meaningful disclosure of credit terms to consumers." 15 U.S.C. § 1601. Regulation Z, 12 C.F.R. § 226.1 *et seq.* (1978), promulgated pursuant to the Truth-in-Lending Act, specifically requires that a finance company or other creditor who offers credit insurance must include the cost of such insurance when calculating the finance charge and computing the annual percentage rate of the loan, unless such insurance is not required by the lender for an extension of credit and the borrower has elected, in writing, to purchase credit insurance after being given written information regarding its optional nature. 12 C.F.R. § 226.4(a)(5) [§ 226.4(d)] [Cited in brackets is the revised Federal Reserve Board citation which may be used after April 1, 1981, and is mandatory after April 1, 1982].

ing credit, and not as the "business of insurance." *Peacock Buick, Inc., supra*, 87 F.T.C. at 381.[11]

Misrepresentations concerning the need for credit insurance inure to the benefit of the lender or car dealership in the form of high sales commissions, yet enable the finance company to continue offering competitive loan rates through nondisclosure to consumers of the extra costs involved in such a purchase. Such actions, although possibly not in technical violation of TILA,[12] clearly undermine the policies of freedom of consumer choice and full cost disclosure embodied in the Act and, as unfair or deceptive trade practices, fall within the Commission's Section 5 jurisdiction. *Peacock Buick, Inc., supra*, 87 F.T.C. at 381.

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[11] Thus, where the Commission's investigation is focused solely on specific oral representations and the manner in which these representations pertain to the overall *credit transaction*, the Commission need not consider whether representations concerning the terms or conditions of credit insurance policies or actual sales of such policies by finance companies or auto dealerships, acting pursuant to an agency relationship with an insurance company, constitute the "business of insurance". Such other activities engaged in by the insurer or its agents and the relationships forged between petitioners and various insurers have no bearing on tangentially related credit activities which are the subject of this investigation and which fall outside the parameters of the "business of insurance." *See* Peacock Buick, Inc., Insurance Co, *supra* 89 F.T.C. at 401.

[12] The Fifth Circuit has held that the Commission may not proceed under TILA against oral representations made by lenders which contradict the written disclosures required by Regulation Z. USLife Credit Corp. v. F.T.C., 559 F.2d 1387 (5th Cir. 1979); Anthony v. Community Loan and Investment Corp., 559 F.2d 1363 (5th Cir. 1977). However, petitioners assertions notwithstanding, nothing in either of these opinions decided after *Peacock Buick* suggests that the Commission is precluded from proceeding against such misrepresentations by lenders or others under its more general authority to prohibit unfair or deceptive practices found in Section 5 of the FTC Act.

Acceptance of petitioners' expansive definition of the "business of insurance," would serve to interfere with the legitimate federal regulatory interest in uniform protections against unfair and deceptive credit practices, while doing little to further the judicially interpreted goals of the McCarran Act. *Peacock Buick, Inc., supra*, 87 F.T.C. at 382; *Providence Washington Insurance Co., supra*, 89 F.T.C. at 407; *see also Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979) (upholding, in part against a McCarran Act challenge, the Comptroller of the Currency's promulgation of a regulation that prevented insiders of national banks from benefitting personally from the receipt of income from the sale of credit life insurance to borrowers).[13] In recognition of this strong federal interest, the Commission stated in *Peacock*

> [W]e think that any reading of the McCarran-Ferguson Act which would harmonize the Congressional goal of federal non-interference with the "business of insurance" with the goal of Federal prevention of deceptive practices must lead to the conclusion that the precise practice in-

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[13] In *Heimann*, a case which is somewhat analogous to this matter in terms of both jurisdictional and factual issues, the district court compared the Comptroller's general authority to police "unsafe and unsound practices" in banking with the Federal Trade Commission's authority over "unfair or deceptive act(s) or practice(s)" in commerce. Independent Bankers Ass'n v. Heimann, *supra*, 613 F.2d at 1169 and n.15.

In reviewing the Comptroller's rationale for regulating the particular conduct at issue, the Court noted that "the receipt by officers and others of personal commissions from credit life insurance sales may well stimulate overselling to potentially uninterested borrowers, often without disclosure to the full board of directors or at the cost of diminished attention to the banks own investment priorities." *Id.* at 1168. Citing the Supreme Court's holdings in *National Securities, Inc.* and *Royal Drug*, the Court concluded that the regulation of income dispensed internally among national bank personnel lies well beyond the core of protection furnished by state insurance laws under the [McCarran] Act. *Id.* at 1170.

> volved here is not, within the statutory contemplation, the "business of insurance" . . . We do not believe as respondents would have it, that the McCarran-Ferguson Act was intended to encroach so fundamentally on areas of Federal concern other than insurance . . ." *Peacock Buick, Inc., supra*, 87 F.T.C. at 382.

Any other finding concerning this investigation would contravene the axiom that "[b]road exemptions from the antitrust laws and from major consumer protection legislation ought not to be conferred lightly . . ." *Providence Washington Insurance Co., supra*, 89 F.T.C. at 407; *see Group Life & Health Insurance Co.* v. *Royal Drug Co., supra*, 440 U.S. at 231.

II.

Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46, as amended by Section 5(a) of the FTC Improvements Act of 1980, 94 Stat. 374, 375, prohibits the Commission from investigating those practices which constitute the "business of insurance," as defined by the McCarran Act, except in those instances in which it is requested to conduct studies and prepare reports by a majority of either of its oversight committees.[14] The 1980 amendment was not intended to alter the definition of "business of insurance" contained in the McCarran Act. Because the practices currently under investigation do not constitute the "business of insurance" within the meaning of the McCarran Act, Section 6, as amended by Section 5(a) of the FTC Improvements Act of 1980, does not limit this investigation in any manner.

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[14] Section 5(a) of the 1980 Act amended Section 6 of the FTC Act by adding a new paragraph at the end of the section:

> Nothing in this section (other than the provisions of clause (c) and clause (d) shall apply to the business of insurance except that the Commission shall have the authority to conduct studies and prepare reports relating to the business of insurance . . . only upon receiving a request which is agreed to by a majority of the members of the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Interstate and Foreign Commerce of the House of Representatives.

The insurance proviso contained in Section 5(a) clarifies that the McCarran Act exemption in Section 6 of the FTC Act extends not only to law enforcement actions but also, absent a Congressional request as set forth above, to fact-finding investigations and the issuance of public reports concerning the "business of insurance."[15] The legislative history makes plain, however, that the amendment was not intended to affect the Commission's existing jurisdiction, as circumscribed by the McCarran Act, to conduct law enforcement investigations to determine whether conduct violates Section 5. S. Rep. No. 96-500, at 15.[16]

In the instant matter, the Commission is not gathering information concerning or otherwise investigating the "business of insurance" in an instance where it would be precluded by the McCarran Act from bringing an enforcement action. The subject matter of this Commission inquiry is representations by

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[15] The Senate report states:

> The Committee believes that additional legislative action in the form of a clarifying amendment is now needed because of the FTC actions inconsistent with the jurisdictional limitations imposed by the McCarran Act * * *. [T]he Commission has erroneously interpreted the McCarran Act to preclude only enforcement action under Sections 5 and 18 of the FTC Act, but not factfinding investigations or the issuance of public reports.

S. Rep. No. 96-500, 96th Cong., 2d Sess. 14 (1980).

[16] The emphasis in the legislative history of the insurance proviso is that it was intended to clarify the jurisdictional limits of the McCarran Act rather than to alter any existing authority. While the Senate Report also states that the limit on the Commission's authority under the amendment "does not require the existence of state regulations as is required by the McCarran-Ferguson Act" (S. Rep. No. 96-500 at 14), it is unnecessary for the purposes of this investigation to determine whether the Section 6 proviso creates a more limited test for exemption under the McCarran Act. Here, the Commission need only address the threshold issue of whether or not the instant inquiry concerns the "business of insurance". 15 U.S.C. § 1101. See discussion, *supra*, at 3, n.4.

car dealers and finance companies that the purchase of credit insurance is a prerequisite to the extension of credit; it does not relate to risk spreading arrangements, nor does it concern the relationship between the insurer and insured, which is the core of the "business of insurance." *SEC* v. *National Securities, Inc.*, *supra*, 393 U.S. at 460; *see generally Group Life & Health Ins. Co.* v. *Royal Drug Co.*, *supra*, 440 U.S. 205.[17] Accordingly, for the reasons set forth here and in Part I above, the Commission concludes that this investigation violates neither congressional intent in enacting the amendment to Section 6 of the FTC Act nor the explicit language of that section.

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[17] In ascertaining the limits placed upon the Commission's investigative authority by the McCarran Act, the Senate Report states that the Commission "will adhere to the judicial precendents." S. Rep., 96-500, at 15. In so doing, the Commission has concluded that the instant investigation falls well outside the sphere of "business of insurance" activities intended by the McCarran Act. *See, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., *supra*, 440 U.S. 205.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
No. 82-201
SECTION "A"

FEDERAL TRADE COMMISSION

VS.

DIXIE FINANCE COMPANY, INC, *et al.*

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.

June 23 — 9:03 AM — '82
NELSON B. JONES
CLERK

JUDGMENT

Considering the written reasons on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of plaintiffs, Federal Trade Commission, and against the defendants, Dixie Finance Co., Inc. and TransSouth Financial Corp., ordering said defendant's to produce the documentary evidence as required in the civil investigative demand issued.

New Orleans, Louisiana, this 22nd day of June, 1982.

Nelson B. Jones
NELSON B. JONES

APPROVED AS TO FORM:

/s/ Loretta G. Whyte
LORETTA G. WHYTE
CHIEF DEPUTY CLERK

/s/ Charles Schwartz, Jr.
CHARLES SCHWARTZ, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

In the

United States Court of Appeals
For the Seventh Circuit

No. 82-2510

GENERAL FINANCE CORPORATION,
POSTAL FINANCE COMPANY, and
BARCLAYS AMERICAN CORPORATION,
Plaintiffs-Appellants,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 81 C 6564—Susan Gettendener, *Judge*.

ARGUED JANUARY 18, 1983—DECIDED FEBRUARY 10, 1983

Before BAUER, WOOD, and POSNER. *Circuit Judges.*

POSNER, *Circuit Judge*. The plaintiffs-appellants are three companies engaged in the consumer-loan business. Although they are not insurance companies, they sell credit life insurance, as agents of such companies, in conjunction with loans they make; and they brought this suit in the federal district court in Chicago for a declaratory judgment and injunction to prevent the Federal Trade Commission from investigating their insurance activities. They say that the investigation violates section 6 of the Federal Trade Commission Act, 15

U.S.C. § 46—the very statute that confers investigatory powers on the Commission—by virtue of a provision added to the section in May 1980 by the Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252, § 5(a), 94 Stat. 376. The provision states: "Nothing in this section . . . shall apply to the business of insurance . . ." The plaintiffs base federal jurisdiction on 28 U.S.C. § 1331, the general federal question jurisdiction statute. Although 28 U.S.C. § 1337, which gives the federal district courts original jurisdiction over suits arising under acts of Congress regulating interstate commerce, including the Federal Trade Commission Act, was the preferred jurisdictional basis of suits seeking to enjoin the FTC in the days when section 1331 had a minimum amount in controversy requirement, it no longer makes any difference which section is used.

The district court dismissed the suit on the ground that it was an inappropriate method of seeking a judicial determination of the lawfulness of the Commission's investigation, and the plaintiffs have appealed.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides that the Federal Trade Commission Act is "applicable to the business of insurance [only] to the extent that such business is not regulated by State law." In the late 1970s—a feisty era for the Federal Trade Commission, under the controversial chairmanship of Michael Pertschuk—the Commission took the position that the McCarran-Ferguson Act limited only its power to bring cease and desist order proceedings under section 5 of the Federal Trade Commission Act and not its investigatory powers under section 6, and launched a series of investigations of matters plainly beyond the reach of section 5 as amended by the McCarran-Ferguson Act—matters such as "the fairness of risk classification and pricing in the area of private automobile insurance, and . . . the extent to which the Los Angeles insurance market is adequately served." S. Rep. No. 500, 96th Cong., 1st Sess. 14 (1979). The 1980 amendment to section 6 made the McCarran-Ferguson Act expressly applicable to that section. See *id.* at 13-15.

Nevertheless, in September 1980, after the amendment was passed, the Commission announced a section 6 investigation of the plaintiffs and 40 other companies (including some automobile dealers) engaged in the consumer-loan business. The purpose of the investigation was to determine whether the companies were violating section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1)—which, so far as is relevant here, forbids "unfair or deceptive acts or practices in or affecting [interstate] commerce"—by misrepresenting to customers that they had to buy credit life insurance in order to get credit granted or extended. Although the Commission had been investigating the alleged practice informally for a decade, it now wanted to use compulsory process; and in May 1981, it followed up its announcement of the formal investigation by issuing a "civil investigative demand," a type of subpoena, to each of the 48 companies, pursuant to section 20(c) of the FTC Act, 15 U.S.C. § 57b-1(c).

The companies petitioned the Commission under 15 U.S.C. § 57b-1(f) to quash the subpoenas. When the Commission denied the last petition on November 17, 1981, compliance with the subpoenas was due, see 15 U.S.C. § 57b-1(f)(2), unless the Commission extended the due date. The Commission says it granted an extension to one of the plaintiffs, BarclaysAmerican, till November 27. Although BarclaysAmerican disputes this, the issue is trivial since there are no sanctions for failing to comply with a subpoena of this type unless and until a district court enters an order under section 20(e) of the Act, 15 U.S.C. § 57b-1(e), directing compliance. See 15 U.S.C. § 57-1(h); cf. 15 U.S.C. § 50; S. Rep. No. 500, *supra*, at 15-16.

So the plaintiffs could, after the FTC's deadline for compliance had passed, have sat back and waited to be sued under section 20(e). But instead they brought this suit on November 23, 1981. Other subpoenaed companies brought similar suits in other districts at about the same time, but the other suits have been either dismissed or consolidated with the FTC's enforcement action in Philadelphia (about which more presently) ex-

cept for one that is pending in another district court in this circuit.

On December 14, 1981, the Commission filed in the federal district court in Philadelphia a section 20(e) enforcement suit against the three plaintiffs in this suit and three of the other companies if had subpoenaed. The Commission's counsel told us at oral argument that Philadelphia was chosen because it was the district where the largest number of subpoenaed companies—eight—could be joined, consistently with the limitation of venue in section 20(e) to districts in which the defendant "resides, is found, or transacts business." (The reason only six of the eight companies were sued is that the Commission worked out an informal settlement with the other two). The district court in Philadelphia initially stayed the suit with respect to those defendants that are the plaintiffs in this case, but it vacated its stay after the court below dismissed this case. Other Philadelphia defendants filed counterclaims against the Commission to enjoin it from continuing its investigation of credit life insurance, but the court in Philadelphia dismissed these counterclaims on the ground that the defendants could get the relief they wanted simply by defending against the FTC's suit. *FTC* v. *Manufacturers Hanover Consumer Services, Inc.*, 543 F. Supp. 1071 (E.D. Pa. 1982).

If it were not for the amendment to section 6 that forbids the Federal Trade Commission to investigate "the business of insurance," there would be no doubt that this suit was properly dismissed even though it is within the literal terms of 28 U.S.C. §§ 1331 and 1337. You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under 1331 or 1337; the specific statutory method, if adequate, is exclusive. See Administrative Procedure Act, §§ 10(b), (c), 5 U.S.C. §§ 703, 704; *Assure Competitive Transport, Inc.* v. *United States*, 629 F.2d 467, 471 (7th Cir. 1980). Therefore the target of a section 6 investigation may not maintain a suit under sections 1331 or 1337 to enjoin the investigation but must wait till the government sues to enforce a subpoena or other

compulsory process in aid of the investigation, since that is the method of judicial review of FTC investigations that Congress has prescribed. The Supreme Court so held more than 50 years ago, *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-74 (1927), and its holding is repeated in numerous court of appeals cases—*Wearly* v. *FTC*, 616 F.2d 662 (3d Cir. 1980), being the most recent, and *First Nat'l City Bank* v. *FTC*, 538 F.2d 937 (2d Cir. 1976), a suit by a bank claiming that it was within the express exemption from section 6 for banks, the most like this case. Cases involving investigations by other agencies reach the same result. See, e.g., *Reisman* v. *Caplin*, 375 U.S. 440 (1964).

Long before the FTC's investigation of the marketing of credit life insurance can bear fruit in the form of cease and desist orders for violations of section 5, the FTC will have to go into court—it has already gone into court—to enforce its subpoenas. Since the plaintiffs can, in the subpoena enforcement proceeding, get a judicial determination of the lawfulness of the investigation before any sanction for violating the law is imposed on them, a still earlier round of judicial review, in a suit to enjoin the investigation, would waste judicial resources. Cf. *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980). This assumes, of course, that the lawfulness of the investigation is reviewable in the action to enforce the subpoena. Although the scope of judicial review in such an action is limited, see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 215-17 (1946), there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigatory powers. *FTC* v. *Miller*, 549 F.2d 452, 460 (7th Cir. 1977); cf. *Walling*, *supra*, at 216.

The waste of judicial resources would be very great in a case like this, where the investigation is industry-wide. The plaintiffs would have us allow each of them of the 43 targets of the investigation to sue the FTC, maybe in 43 different districts, though some consolidation might be ordered, see *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967). If judicial

review is confined to suits to enforce the subpoenas, budgetary limitations if nothing else should force the FTC to bring as few such suits as it can do consistently with observing the venue limitations of section 20(e).

The plaintiffs argue, however, that the 1980 amendment to section 6 gave insurance companies a specific right not to be investigated which they can enforce under 28 U.S.C. §§ 1331 or 1337 without waiting for the Commission to sue them under 15 U.S.C. § 57b-1(e). They base this argument on the legislative history of the amendment, which they say shows that Congress wanted the targets of section 6 investigations to be able to bring suit to enjoin any investigation that was within the scope of the insurance exemption, and on the Supreme Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Abbott Laboratories* v. *Gardner*, *supra*.

Although the Commission in the 1970s claimed the power to investigate matters over which the McCarran-Ferguson Act had stripped it of any enforcement powers, and the 1980 amendment to section 6 rejected that claim, the legislative history contains no evidence that Congress thought the limitation it was placing on the Commission's investigative powers could not be adequately policed by courts asked to enforce compulsory process. It is true that section 6 is not confined to investigations in which such process is used, but this has always been true and there is no indication that Congress in 1980 or at any other time thought subpoena enforcement proceedings gave the targets of unlawful section 6 investigations inadequate protection; the objective of the amendment was substantive rather than remedial. The plaintiffs' argument would require us to choose between untenable interpretations of the 1980 amendment; that it gave a right to action to firms in the insurance business but not to banks, savings and loan institutions, and common carriers, which section 6 also places beyond the Commission's investigative reach; and that although limited to the business of insurance the amendment gave all exempt targets of section 6 investigations a right of action.

Leedom v. *Kyne* was a suit by the president of a union of professional employees against the members of the Labor Board. The union wanted to be the collective bargaining representative of just the professional employees at a plant but the Board expanded the collective bargaining unit to include non-professional employees. After the union won an election held on the basis of the expanded unit, the plaintiff brought suit under 15 U.S.C. § 1337 to set aside the Board's order certifying that unit. The Supreme Court described the suit as one "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition of the Act" against combining professional and non professional employers in the same bargaining unit, 35 U.S. at 188, and held that "where, as here, Congress has given a 'right' to the professional employees it must be held that it intended that right to be enforced . . .," *id.* at 191. The plaintiffs in this case argue that the 198 amendment to section 6 gave them a right to be free from an investigation of their insurance activities and that it must be held that Congress intended that right to be enforced by the route they have taken.

But *Leedom* v. *Kyne* differs from the present case in two respects. First, it is unclear how the union could have obtained judicial review of the Board's action in certifying an improper bargaining unit except by the method used. Review of certification orders normally comes about in the following manner: the employer refuses to bargain with the union, thus precipitating an unfair labor practice proceeding against the employer and the lawfulness of the certification is reviewed on the employer's appeal from the Board's remedial order in the unfair labor practice proceeding. If the employer in *Leedom* v. *Kyne* was indifferent to the composition of the bargaining unit, as it may well have been, the lawfulness of the certification could not have been reviewed in the ordinary way of Board orders. The plaintiffs in the present case had only to contest the Commission's efforts to enforce the subpoenas in Philadelphia—which they are doing—to get judicial review of the Commission's alleged violation of section 6. The question in

Leedom v. *Kyne* was whether judicial review should be held to be entirely precluded despite the presumption of judicial reviewability of agency action in section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702; the question here is just the timing and adequacy of judicial review by the prescribed method, a subpoena enforcement proceeding.

Second, the impropriety of the Board's action was conceded in *Leedom* v. *Kyne*, but here, despite the very emphatic language in the plaintiffs' brief, it is uncertain whether the Commission exceeded its authority under section 6. The meaning of "the business of insurance," the operative phrase in both the McCarran-Ferguson Act and the amended section 6 of the FTC Act, is unsettled. Selling life insurance as an agent for an insurance company is the business of life insurance in a literal but maybe not the intended sense. The Senate Report does describe the business of insurance comprehensively and even says it includes "the selling and advertising of policies," *S. Rep. No. 500, supra, at 15*, which is what the Commission is investigating here. But the report states on the same page that "the amendment does not affect the FTC's existing jurisdiction, as circumscribed by the McCarran Act, to conduct law enforcement investigations to determine whether conduct violates section 5 of the FTC Act" and that "the FTC retains its authority to conduct law enforcement investigations of the insurance business (to the extent presently permitted by the McCarran Act)." And, still on the same page, the report refers approvingly to *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), where the Supreme Court had read the legislative history of the McCarran-Ferguson Act as "strongly suggest[ing] that Congress understood the business of insurance to be the underwriting and spreading of risk" and had expressly left open the question whether "the fixing of agents' commissions" was part of the business. *Id.* at 221, 224 n. 32. *Royal Drug* gives the Commission some room to argue that it can, without violating the insurance proviso in section 6, act against misrepresentations in the sale of insurance by companies that are not insurance companies and that are using

the misrepresentations to get more finance business rather than more insurance business. The Fifth Circuit has just accepted this argument, *FTC* v. *Dixie Finance Co.*, No. 82-3404 (Jan. 20, 1983) (per curiam), and while the district court in Philadelphia, or the Third Circuit, may decide in the subpoena enforcement proceeding that the 1980 amendment bars the investigation after all—may reject *Dixie Finance*, a decision by a divided panel—it cannot be said that the Commission is flouting a clear legislative directive, as the Labor Board was doing in *Leedom* v. *Kyne*.

As interpreted by this and other circuits, see, e.g., *American Gen'l Ins. Co.* v. *FTC*, 496 F.2d 107, 200 (5th Cir. 1974); *Frey* v. *Commodity Exchange Authority*, 547 F.2d 47, 49 (7th Cir. 1976), the principle of *Leedom* v. *Kyne* has become a special case of a more comprehensive principle, also invoked by the plaintiffs, as to when 28 U.S.C. §§ 1331 or 1337 may be used to obtain judicial review of preliminary administrative action. Announced in *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149-53, the broader principle is a gloss on section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, which authorizes judicial proceedings to review "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . ." No statute makes a decision by the FTC to launch an investigation under section 6 of the FTC Act reviewable. But if that decision can fairly be regarded as "final," it is judicially reviewable anyway, and, "in the absence or inadequacy [of the special statutory review proceeding], [in] any applicable form of legal action . . . in a court of competent jurisdiction." APA § 10(b), 5 U.S.C. § 703. If the subpoena enforcement proceeding provided for in section 20(e) of the Federal Trade Commission Act is inadequate for getting that decision reviewed, then the applicable form of legal action would be an injunctive or declaratory suit under 28 U.S.C. §§ 1331 or 1337.

The final step in the analysis is supplied by *Abbott Laboratories* itself, and the many cases following it such as *Wearly* v. *FTC*, *supra*, 616 F.2d at 666-68; formally nonfinal agency

action, not reviewable in a special statutory review proceeding, is final, and reviewable under sections 1331 or 1337, when it is ripe for judicial review, and it is ripe when (1) further proceedings before the agency are not necessary to give sharp focus to the issue on which judicial review is sought, and (2) the action of which review is sought is hurting the plaintiff now—is not just a portent of a future harm that cannot occur unless and until the agency takes other measures against him. *Leedom* v. *Kyne* was ripe by this standard because the plaintiff was raising a pure issue of law whose definition would gain nothing from further administrative proceedings, and the injury to the union in having to represent employees it did not want to represent was immediate and could not be redressed through any alternative channel of judicial review.

The question the plaintiffs want us to decide is ripe in the first sense, that is, adequately focused—it could, after all, be decided in a subpoena enforcement proceeding brought at the same stage of the investigation. But it is not ripe in the sense of creating an immediate injury. Compliance with the subpoenas could be a hardship but it is one the plaintiffs can prevent by defending successfully against the Commission's enforcement action in Philadelphia. The only harm the plaintiffs cannot ward off in Philadelphia is whatever harm they may suffer from being investigated by means other than compulsory process—and we doubt that there is any such harm, present or impending, even if we disregard the Commission counsel's assurance at oral argument that the informal investigation has been suspended pending the outcome of the subpoena enforcement suit. If the plaintiffs were as tormented by the informal investigation as they now say they are, they would have brought this suit right after the amendment to section 6 became effective, in the spring of 1980; they would not have waited 18 months till compliance with subpoenas issued by the Commission was due. It is the subpoenas that worry them, not the pinpricks that a Commission stripped of its coercive powers of investigation might still be able to inflict. The impact of the informal investigation falls far short of that of the regula-

tion challenged in *Abbott Laboratories*, which required "an immediate significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance . . ." 387 U.S. at 153.

All this is not to deny that the principle of *Leedom* v. *Kyne* as refined in *Abbott Laboratories* may some day write *finis* to the Commission's investigation of the plaintiffs' insurance activities. Suppose that the Third Circuit holds, contrary to the Fifth Circuit, that the Commission exceeded its authority in conducting the investigation, and quashes the subpoenas, and the Supreme Court affirms the Third Circuit, yet the Commission continues the investigation—not with compulsory process, of course, but by interviewing state insurance regulators and the plaintiffs' customers, competitor and employees and by sending investigators to the plaintiffs' offices, posing as customers. The Commission would then be exceeding a clear congressional mandate—more precisely, a mandate made clear by authoritative judicial interpretation—in circumstances where the victims of its unlawful activity, like the union in *Leedom* v. *Kyne*, had no judicial remedy other than a suit under 28 U.S.C. §§ 1331 or 1337. The Commission's investigation would still be pesky rather than menancing but it could impose cumulatively significant cost on the plaintiffs.

The plaintiffs have jumped the gun, however. The Commission is not yet acting in clear defiance of Congress, and they have a good alternative remedy in Philadelphia. Although that remedy theoretically is not perfect, because it is limited to investigation by compulsory process, we cannot believe that the Commission, which has had to fight for its very survival in recent Congresses, would run the risk of incurring the further wrath of Congress by persisting in an investigation after the courts held that it violated an express and recently enacted statutory limitation on the Commission's powers.

It remains to consider the proper form of dismissal in this case. We cannot tell whether the district court dismissed the suit for lack of subject-matter jurisdiction or for lack of equity.

Both formulations are found in the cases. Compare *Wearly* v. *FTC*, *supra*, 616 F.2d at 668, with *First Nat'l City Bank* v. *FTC*, *supra*, 538 F.2d at 938-39. The choice is not inconsequential, and not only because issues of subject-matter jurisdiction are not waivable and issues of equitable discretion are. If the question on appeal is not whether the district court had jurisdiction but whether it abused its discretion in granting or denying the relief sought by the plaintiff, the system of judicial review of agency action will be as various as the individual judgments of federal district judges, and an already complicated and uncertain system will be a good result, or one intended by Congress. The jurisdiction of the federal courts to review administrative action is codified in the Administrative Procedure Act. If a review proceeding is not authorized by section 10(c), because it is premature, general jurisdictional statutes such as 28 U.S.C. §§ 1331 and 1337 cannot be used to confer jurisdiction.

This case must therefore be dismissed for lack of jurisdiction and not merely for lack of equity. As so clarified, the judgment dismissing the complaint is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

STATUTORY ADDENDUM

Section 5 of the Federal Trade Commission Act provides in relevant part:

> "(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> * * *
>
> (m)(1)(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—
>
> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
>
> (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.
>
> In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation." 15 U.S.C. §§ 45(a), (m)(1)(B).

Section 6 of the Federal Trade Commission Act provides in relevant part:

> "The Commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.
>
> (h) * * *

Nothing in this section (other than the provisions of clause (c) and clause (d) shall apply to the business of insurance, except that the Commission shall have authority to conduct studies and prepare reports relating to the business of insurance. The Commission may exercise such authority only upon receiving a request which is agreed to by a majority of the members of the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Energy and Commerce of the House of Representatives. The authority to conduct any such study will expire at the end of the Congress during which the request for such study was made." 15 U.S.C. §§ 46(a), (h).

Section 20 of the Federal Trade Commission Act provides in relevant part:

"(a) For purposes of this section:

(1) The terms "civil investigative demand" and "demand" mean any demand issued by the Commission under subsection (c)(1) of this section.

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title).

(3) The term "Commission investigator" means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title).

(4) The term "custodian" means the custodian or any deputy custodian designated under section 57b-2(b)(2)(A) of this title.

(5) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(6) The term "person" means any natural person, partnership, corporation, association, or other legal enti-

ty, including any person acting under color or authority of State law.

(7) The term "violation" means any act or omission constituting an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 45(a)(1) of this title).

(b) For the purpose of investigations performed pursuant to this section with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), all actions of the Commission taken under section 46 and section 49 of this title shall be conducted pursuant to subsection (c) of this section.

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), the Commission may, before the institution of any proceedings under sections 41 to 46 and 47 to 58 of this title, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

(2) Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

(3) Each civil investigative demand for the production of documentary material shall—

(A) describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available.

(4) Each civil investigative demand for written reports or answers to questions shall—

(A) propound with definiteness and certainty the reports to be produced or the questions to be answered;

(B) prescribe a date or dates at which time written reports or answers to questions shall be submitted; and

(C) identify the custodian to whom such reports or answers shall be submitted.

* * *

(e) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section. All process of any court to which application may be made as provided in this subsection may be served in any judicial district.

* * *

(h) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal pursuant to section 1291 of Title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of such court." 15 U.S.C. §§ 57b-1(a), (b), (c)(1), (c)(2), (c)(3), (c)(4), (e) and (h).